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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EX PARTE

March 25, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Re: Petition of CFA and NCTA for Rulemaking, RM-8221,
and Telephone/Cable Cross-Ownership, CC Docket No.
87-266

Dear Mr. Caton:

On March 4, 1994, Consumer Federation of America (CFA) and National Cable Television Association (NCTA) wrote to Chairman Hundt about "unfolding developments regarding video dialtone." Basically, CFA and NCTA do not want the Commission to process video dialtone Section 214 applications until it has resolved seven generic issues through rulemaking and Federal/State Joint Board proceedings.

Bell Atlantic responded to the letter on March 14, explaining, among other things, how further regulatory delay threatens the viability of several important video dialtone projects and, ultimately, the deployment of competitive video delivery systems. I am writing on behalf of Pacific Bell to amplify its position on a critical issue mentioned again by CFA and NCTA: whether the Commission must convene a Joint Board and await its recommendations before processing Section 214 video dialtone applications.

Pacific Bell maintains that the Commission is not legally required under Section 410(c) of the Communications Act to convene a Joint Board to examine separations and related cost allocation issues associated with the deployment of broadband facilities. On the contrary, referring these matters to a Joint Board would be inconsistent both with the Commission's exercise of its exclusive regulatory authority and with national policy favoring rapid deployment of new telecommunications infrastructure.

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Attached is an outline of Pacific Bell's legal analysis demonstrating that the Commission has both the authority and the regulatory tools to permit local exchange carriers to build and operate video dialtone systems without fear of cross-subsidization or misallocation of costs. The Commission need only direct the carriers to comply with its existing rules in Parts 32, 36 and 64.

The Commission will do a grave injustice to the American public if it countenances the multi-year delay implicit in CFA's and NCTA's recommendations. It already has adequate methods of auditing carriers' activities and requiring remedial action in the unlikely event that it uncovers any significant cost allocation or competitive problems. The consuming public and the Government's plans for economic growth are placed in far greater jeopardy if the Commission does not devote its resources to immediate approval of pending video dialtone applications.

I am filing two copies of this letter in accordance with Section 1.1206(a) of the rules. Please contact me if you have any questions concerning this matter.

Sincerely,

William F. Adler/SCW

Attachment

CC: Chairman Reed Hundt
Commissioner James Quello
Commisisoner Andrew Barrett
Karen Brinkmann
Rudy Baca
Jim Coltharp
Richard Metzger
Jim Keegan
Olga Madruga-Forti
Robert Pepper
William Kennard
Michael Carowitz

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ISSUE: Is the FCC legally required to refer separations and related cost allocation questions associated with broadband services (video dialtone) to a Joint Board?

ANSWER: No, unless the FCC adopts a notice of proposed rulemaking to change Part 36 separations regulations.

- FCC's authority to decide how to classify telephone company property, and how much to classify, as interstate is permissive under Section 221(c)
 - Part 36 is not exclusive method of allocating costs or property
 - Act does not specify methodology
 - FCC may use "informal" procedures, e.g., "average schedules"
 - Section 214 proceeding does not trigger "mandatory joint board" under Section 410(c)
- FCC may use Part 64 cost allocation principles as long as it provides rational explanation
 - Video dialtone services and video signals are exclusively interstate
 - Under MFJ video carriage is interLATA and video signals carried are information services
 - Part 36 assigns categories of plant and expenses between state and interstate; not designed to address specific facilities or to allocate costs among services carried
 - Typical Part 36 "relative use" allocators would not accurately reflect use of mixed video/telephony facility
 - Part 36 separations designed for monopoly local exchange network, which will not exist within a few years
- Policy goals favor use of informal procedures, avoidance of Part 36 amendments
 - National policy favors rapid deployment of information age infrastructure, of which exchange carrier broadband architecture is major component

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- Rational, economically-based allocation of common costs of VDT transport networks is critical to viability of new, competitive video services
- Part 36 only applies to local exchange carriers, not to others providing multiple services (cable, long distance or wireless); FCC policy disfavors asymmetric regulation
- Part 64 cost allocations can be applied now
 - Part 64 principles are well-understood, have been implemented successfully for years, can be applied to broadband services and are easily auditable
 - As fully distributed costing methodology, Part 64 would capture all costs of video dialtone
 - FCC directed Pacific Bell to use Part 64 to keep separate costs of its Palo Alto channel distribution service offering
 - Part 64 can at least be used as interim measure to facilitate rapid deployment of service until FCC's 1996 comprehensive review of video dialtone policy or until overhaul of Part 36

CASES

MCI v. FCC, 750 F.2d 135, 141 (D.C.Cir. 1984), and Smith v. Illinois Bell, 282 U.S. 133, 150 (1930) (methodology by which FCC exercises authority to determine how much property is interstate is permissive)

Crockett Telephone Co. v. FCC, 963 F.2d 1564 (D.C.Cir. 1992) (FCC must refer separations issues to joint board only if it institutes proceeding by notice of proposed rulemaking)

MCI v. FCC, 675 F.2d 408 (D.C.Cir. 1982) (FCC has authority to develop informal separations methods in context of Section 214 proceeding)

MCI v. FCC, 750 F.2d 135, 142 (D.C.Cir. 1984), and MCI v. FCC, 675 F.2d 408, 415-16 (D.C.Cir. 1982) (choice of cost allocation methodology may include considerations of policy, elements of fairness and other values)

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Application of Pacific Bell to Discontinue Channel Service in Palo Alto, CA, 6 FCC Rcd 688, 692 (1991) (cost accounting rules adopted in Joint Costs Proceeding, CC Docket No. 86-111, assure that any cross- subsidization between Pacific Bell and cable company is "readily revealed")

REFERENCE

"Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change," OPP Working Paper No. 25, 4 FCC Rcd 1306 (1988), at paras. 56-61 (relative use would be an "absurd" method that would allocate costs to video services in a way that would eliminate the possibility of a competitive offering)